IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISC. APPLICATION NO. 160 OF 2005.

Shri Mohan Krishna Gaude,
Major, married,
resident of Bagwada, Khandola,
Marcela, Goa. ... Applicant.

Versus

1. S T A T E.

2. Shri Vishwajit Vinayak Gaude,
major, r/o Bagwada, Khandola,
Marcel, Goa. ... Respondents.

Shri Arun Bras de Sa, Advocate for the Applicant.

Shri S.N. Sardessai, Public Prosecutor for the Respondent No.1.

Shri R.S. Sardessai, Advocate for the Respondent No.2.

CORAM: N. A. BRITTO, J.

DATE: 22nd SEPTEMBER, 2005.

ORAL ORDER:

The Applicant is accused No.1 in C.C. No. 8/P/2003/A against whom process has been issued by the learned J.M.F.C., Ponda by Order dated 20.8.2004 under Sections 143, 147, 148, 323, 324, 504, 506(II) r/w S.149 I.P.C. and has invoked the extraordinary jurisdiction of this Court under S.482 of the Code of Criminal Procedure, 1973 (Code, for short) to qash and set aside the said Order dated 20.8.04.

2. This Court, by Order dated 12.8.05 entertained the petition and stayed further proceedings in the said criminal case. It is therefore necessary to dispose of the petition on merits and for this purpose certain facts are required to be taken note of.

3. An incident took place on 17.12.99 between 9 and 9.30 p.m. At Bagwada, Khandola, Marcel, Goa. As regards the said incident, one Jivaji Gaude filed a complaint/F.I.R. with the allegation that when he was at his residence he had heard some noise behind his house and upon hearing the same, he along with Shantaram Gaude, Navso Gaude, Mohan Gaude, Raju Gaude and Amar Gaude had gone running to the spot and when they reached there, Uttam Gaude/A-1, Prakash Gaude/A-3, Viswajit Gaude/A-4 and Madhu Gaude/A-13 started assaulting them with iron bars, dandas and stones and due to the said assault, Mohan Gaude (applicant herein) and Shantaram Gaude were injured with severe injuries and they all were injured because the accused (17 of them) assaulted them. The said F.I.R. came to be registered, investigated and a charge sheet was filed by the Ponda Police Station which was registered as C.C. No. 32/S/2000/A. Subsequently the learned J.M.F.C. Ponda by his Judgment and Order dated 30.4.2005 convicted and sentenced all the said 17 accused in the C.C. No.32/S/2000/A.

4. As regards the same incident, Vishwajit Vinayak Gaude-Respondent No.2 herein and complainant in C.C. No.8/P/03/A also filed a complaint which was treated by the Police as N.C. bearing No.916/99 under Sections 504, 323 I.P.C. The said N.C. was filed only against Mohan Krishna Gaude/A-1, Vassudev Krishna Gaude /A-2, Chandrakant Arjun Gaude/A-3 and Chandrakant Gaude.

5. The said Vishwajit Vinayak Gaude (complainant, for short) then filed a complaint on or about 20.1.03 before the learned J.M.F.C. which came to be registered as C.C. No.8/P/03/A. After the said complaint was presented by the complainant on 20.1.03, the proceedings were fixed for verification on 14.2.03 but later on on 14.2.03, 6.3.03, 20.8.03 the case was adjourned and on each of the said occasions it was fixed for verification. On 3.4.03 the learned J.M.F.C. noticed that the complainant had filed the said complaint on 20.1.03 after the expiry of the limitation period an therefore asked the Advocate of the complainant to satisfy him on that point whether the Court should take cognizance of the case after the expiry of the limitation period and the Advocate for the complainant sought time to advance arguments and the case was adjourned to 2.5.03 and on this day also the learned J.M.F.C. asked the learned Advocate appearing on behalf of the complainant to enlighten him before verification was recorded whether cognizance could be taken, but on the next date when the case was taken

up before the learned J.M.F.C., the learned Advocate appearing on behalf of the complainant submitted that he did not wish to argue the case and left the matter to be decided by the learned J.M.F.C. It appears that the learned J.M.F.C. also did not find out whether he could take cognizance of the complaint in view of the doubt expressed by him that it was barred by limitation but chose a short-cut and sent the complaint to Ponda Police Station for investigation under S.156(3) of the Code.

6. After the report was submitted by the Ponda Police Station, on or about 20.8.04, the learned J.M.F.C. after hearing the Advocate of the complainant and upon perusing the report submitted, ordered process against the accused under different Sections to which reference has already been made.

7. On behalf of the accused an application was filed for recalling of process on the ground that the cognizance taken by the learned J.M.F.C. was illegal. That application came to be rejected by the learned J.M.F.C. by Order dated 24.6.05. The learned J.M.F.C. referred to the case of ***Adalat Prasad v. Rooplal Jindal (2004 AIR SCW 5174)*** and concluded that the process issued by the Court could not be recalled as the Order issuing process could not be reviewed. In arriving at the said conclusion and rejecting the application filed on behalf of the accused for recalling the

process, the learned J.M.F.C. observed that the complaint was registered on 20.1.03 and the roznama of that date showed that his predecessor had fixed it for verification on 14.1.03 which indicated that he had taken cognizance of the matter and therefore subsequently could not have asked the Police to investigate under S.156(3) of the Code and therefore without recording the statements of the complainant and his witnesses, process issued based on such a report was bad in law. However, the learned J.M.F.C. as already stated, showed his helplessness to recall the said Order issuing process against the accused in the light of the ruling in Adalat Prasad (supra).

8. Although the learned J.M.F.C., in his Order dated 24.6.05 stated that cognizance was taken by the learned J.M.F.C. on 20.1.03 when his learned predecessor had fixed the case for verification on 14.1.03, Shri Bras de Sa, the learned counsel on behalf of the applicant submits that cognizance was taken by the learned J.M.F.C. on 3.4.03 when the learned J.M.F.C. perused the complaint and found that it was prima facie barred by limitation as sstated in S.468 of the Code. Shri Bras de Sa has further submitted that action under S.156(3) sending the case for investigation by the Police can be taken only at pre-cognizance stage and not thereafter and since the learned J.M.F.C. had already taken cognizanance and had embarked upon the procedure to be followed under Chapter XV, the learned J.M.F.C. was not competent thereafter to shift back to the pre-cognizance stage and take

benefit of S.156(3) of the Code and in such a situation, the order issuing process is unsustainable in the eyes of law and therefore ought to be quashed and set aside.

9. Learned Advocate Shri Bras de Sa further submits that the complaint filed did not disclose an offence punishable under S.506(II) I.P.C. and the other offence mentioned by the complainant were non-cognizable and that apart were also time barred. Shri Bras de Sa further submits that Section 506(II) I.P.C. has also been held by this Court to be non-cognizable and therefore the learned J.M.F.C. was not entitled to refer the case under S.156 (3) for the investigation by the Police because that could be done only in case the offences were cognizable in nature.

10. Shri Sardessai, the learned counsel on behalf of the complainant, has been quick to point out that it would not matter whether S.506(II) was cognizable or not because there were other offences like S.147 and S.324 I.P.C. which were cognizable and therefore the learned J.M.F.C. was certainly justified in referring the complaint to be investigated by the Police under S.156(3) of the Code.

11. As far as the first contention of Shri Bras de Sa is concerned, I am not inclined to accept the same namely that the learned J.M.F.C. had taken

cognizance of the offence before he had directed the complaint to be investigated by the Police under S.156(3) of the Code. On 20.1.03 the complaint was presented before the learned J.M.F.C. and was fixed for verification. The word 'cognizance' has not been defined in the Code but it is generally understood as a word implying judicial application of mind to a matter with a view to take further action into it. In the case of ***Tula Ram and Others v. Kishore Singh [(1977) 4 S.C.C. 459]*** on which reliance has been placed by learned Advocate Shri Bras de Sa, the Hon'ble Supreme Court referred to the case of ***R.R. Chari v. State of U.P. (A.I.R. 1951 S.C. 207)*** and noted that :-

> " Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate as such applies his mind to the suspected commission of an offence. "

12. The Supreme Court again referred to a decision of the Calcutta High Court reported in ***Superintendent and Remembrancer of Legal Affairs, West Bengal v. Abani Kumar Banerjee (A.I.R. 1950 Calcutta 437)*** wherein it was stated thus :-

> " It seems to me clear however that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a), Criminal Procedure Code, he must not only have

> applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter – proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g. ordering investigation under Section 156 (3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence. "

13. The Supreme Court further noted that there was no special charm or any magical formula in the expression "taking cognizance" which merely means judicial application of the mind of the Magistrate to the facts mentioned in the complaint with a view to taking further action. Thus what Section 190 contemplates is that the Magistrate takes cognizance once he makes himself fully conscious and aware of the allegations made in the complaint and decides to examine or test the validity of the said allegations. The Code prescribes several modes in which a complaint can be disposed of after taking cognizance. Cognizance can be taken on the basis of three circumstances: (1) upon receiving a complaint of facts which constitute such offence; (2) upon a police report of such facts; and (3) upon information received from any person other than the police officer or upon his own knowledge, that an offence has been committed.

14. Considering the facts of the case at hand, it does not appear at all that on 20.1.03 the learned Magistrate had at all applied his judicial mind with a view to take further action and that is also now not the case of the petitioner. In fact the learned J.M.F.C. must have not even read the complaint on that day. It is only on 3.4.03 it appears that the learned Magistrate perused the complaint and applied his judicial mind and prima facie found that the complaint appeared to be time barred and therefore asked the learned Advocate of the complainant to satisfy him on that count whether he could take cognizance of the case filed after the limitation period is over. The very words in which the Order dated 3.4.03 is expressed in the roznama, shows that the learned J.M.F.C. had not take cognizance of the case and prior to taking the said cognizance, wanted the learned Advocate of the complainant to satisfy him on the point of limitation. As stated by the Calcutta High Court and approved by the Supreme Court, when a Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of Chapter XV, but for taking action of some other kind, i.e. ordering investigation under S.156(3) or issuing process for the purpose of investigation he could not be said to take cognizance of the offence. In the case at hand, learned J.M.F.C. wanted to know whether he could take cognizance of the offences because he was of the prima facie view that the complaint was time barred and in this view of the matter the action of the learned J.M.F.C. in ordering investigation by

the Police under S.156(3) of the Code, in principle, could not be faulted. Till then the learned J.M.F.C. had not taken cognizance of the offences.

15. However, was the learned J.M.F.C. justified in ordering investigation into the complaint which disclosed offences which were time barred and did not disclose offences which could be said not time barred ?

16.As already seen, the incident took place on 17.12.1999 and the complaint was presented to the Court on 20.1.03 and as noted by the learned J.M.F.C. it was filed after a period of three years, one month and three days. The complaint was shown to have been filed under Sections 143, 147, 148, 323, 324, 504, 506(II) r/w S.147 I.P.C. and it was filed against 13 accused persons including the applicant herein. In my view, a mere mention of sections of the I.P.C. in the absence of any other allegation would not prima facie disclose the commission of an offence. A perusal of the said complaint presented on 20.1.03 contains no averments or allegations that an offence under Section 324 I.P.C. was committed. Likewise there were no averments or allegations that an offence under S.506(II) was committed by the said accused. It may be noted here that in the N.C. filed there was no mention of Section 506 I.P.C. The complaint prima facie disclosed commission of offences under Sections 143, 147, 148, 323, 504 r/w S. 149 I.P.C. Sections 147 and

148 are no doubt cognizable, but they are punishable with imprisonment for less than 3 years. Sections 323 and 504 are also punishable with imprisonment with less than three years. Section 468 of the Code has created a bar for taking cognizance of offences after a lapse of the period of limitation and the period of limitation prescribed as per sub-section (2) of S.468 is:- (a) six months if the offence is punishable with fine only ; (b) one year if the offence is punishable with imprisonment for a term not exceeding one year and © three years if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years. As already stated, none of the offences disclosed by the complaint was punishable with imprisonment exceeding three years. No doubt S.473 of the Code gives power to the Court to take cognizance of the offence after the expiry of the period of limitation in case the Court is satisfied on the facts and circumstances of the case that the delay is properly explained or that it is necessary to do so in the interest of justice. When the complainant was asked by the learned J.M.F.C. to satisfy him as regards the delay in filing the complaint, the least the complainant could do was to satisfy the learned J.M.F.C. and if necessary by filing an appropriate application, that in the facts and circumstances, the delay ought to be condoned or otherwise it was in the interest of justice that the learned Magistrate should take cognizance of the offences. The complainant instead of explaining the

delay appears to have thrown up his hands in despair and chosen not to explain the delay or give some good reasons why the complaint ought to be entertained by the learned J.M.F.C. In my view the learned J.M.F.C. was not at all justified in referring the complaint to be investigated by the Police for offences which it disclosed and which were clearly time barred in the light of Section 468 of the Code.

If the Order dated 13.6.03 cannot be sustained in law, subsequent Order dated 20.8.04 passed by the learned J.M.F.C. have got to fall along with it.

17. Therefore this is a fit case to quash and set aside the process issued against the applicant as well as others who are the accused in C.C. No. 8/P/03/A. As a result, the petition succeeds. The process issued against the applicant and other accused is hereby set aside and the complaint presented on 20.1.03 is dismissed as time barred.

N. A. BRITTO, J.

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